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Aizat Abdullah bin Othman v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-227–05 OF 2019
KAMALUDIN MD SAID, LEE HENG CHEONG AND HASHIM HAMZAH JJCA
4 JANUARY 2023

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Criminal Procedure — Appeal — Trial judge's findings — Appellant convicted and sentenced to death for offence of murder — Whether trial judge failed to comply with s 182A of Criminal Procedure Code — Whether trial judge failed to undertake fair and just assessment of appellant's defence — Whether trial judge erred when His Lordship failed to consider appellant's statement under s 112 of Criminal Procedure Code — Whether trial judge correct in holding that appellant's defence was bare denial and afterthought — Whether appellate intervention warranted — Criminal Procedure Code ss 112, 182 & 182A — Penal Code s 302

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The appellant was charged with the offence of murder of a child ('the deceased child') under s 302 of the Penal Code. The prosecution's case was based on the following evidence: (a) the testimony of the mother of the deceased child ('SP21') that the she had seen the injuries on the body and face of the deceased child since the appellant stayed with them; (b) the testimony of the deceased child's sister, a child witness, that she saw the appellant's actions of beating, punching and kicking the body of the deceased child as well as tying the deceased child's hands and throwing the deceased child against the wall; and (c) the evidence of the the pathologist ('SP11') that the injuries were consistent with that due to blunt force trauma such as strong blows in the form of punches or kicks, and that the injuries were not accidental or self-inflicted. The High Court found that prima facie case was established and called the appellant to enter his defence. In defence, the appellant denied harming the deceased child and contended that SP21 was the one who had beaten and injured the deceased child. The appellant had relied on the evidence of his girlfriend ('SD2') and his best friend ('SD3') to support his testimony that he was auxiliary police in Kuala Terengganu. At the end of the trial, the court convicted and sentenced the appellant to death after finding that the appellant's defence was a bare denial and afterthought. Dissatisfied with the decision, the appellant had filed the present appeal based on two grounds of appeal: (i) that the learned trial judge erred when His Lordship did not comply with s 182A of the Criminal Procedure Code ('the CPC'); and (ii) that the learned trial judge erred when His Lordship failed to undertake a fair and just assessment of the defence case. The appellant submitted that in assessing the appellant's defence, the learned

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trial judge had failed to consider the appellant's statement under s 112 of the CPC ('exh D71') and the conduct of the appellant in bringing the deceased child to the clinic.

Held, dismissing the appeal, and affirming the order of the High Court:

(1) It was a principle of law that when an appeal came before an appellate court, the said appeal took the form of a continuation of a trial and it was open to the appellate court to order or determine if the various findings of the trial court were correct. In the course of carrying out its appellate functions, the Court of Appeal was empowered to conduct an evaluation exercise. Since an appeal was a continuation of proceeding by way of rehearing, an appellate court may subject the evidence to a critical re-examination. It was an established principle that an appellant court should be slow to interfere with the finding of fact by a lower court considering that an appellate court did not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility (see paras 13–14 & 16).

(2) At the conclusion of the trial, s 182 of the CPC imposed a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution had proved its case beyond reasonable doubt. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution (see para 20).

(3) Based on the grounds of judgment of the learned trial judge, His Lordship had undertaken a maximum evaluation of the defence evidence in respect of the appellant, SD2 and SD3. The learned trial judge had also highlighted the discrepancies of the defence's witnesses whom were supposed to be long term close associates of the appellant and found that SD2's testimony that the appellant had stopped working as an auxiliary police and SD3's testimony that the appellant had no other jobs except helping his father to sell fish contradicted the appellant's testimony that he worked as an auxiliary police at the Kuala Terengganu District Police Headquarters. Further, the learned trial judge had evaluated the defence witnesses' demeanour and found that they were not credible. It was trite law that the appellate court would be slow in disturbing the finding of facts by the trial court judge based on credibility of witnesses as the trial judge had the best audio-visual perception of the witnesses (see paras 21–24).

(4) The appellant failed to establish its defence during the case for the prosecution through its witnesses. The appellant sought to shift the blame to SP21 but this was unsuccessful because there was not any iota of evidence adduced that SP21 was a bad mother, a hot-tempered person or incidents where witnesses had seen SP21 hit or punched the deceased child. In addition, the testimonies of the prosecution's witnesses that

SP21 was a loving mother and had never hit or beat her child were not challenged by the defence. The learned trial judge was correct in holding that the appellant's defence that SP21 had pushed and punched the deceased child before SP21 went to work was an afterthought considering that this version was never put to SP21. It was trite law that the defence had to establish its defence during the prosecution stage. Further, the learned trial judge was correct in holding that the appellant's defence was a bare denial considering that it was undisputed that only the appellant, SP24 and the deceased child were at home at the time of the incident, hence, the appellant was the only adult that could have caused the injuries to the deceased child which led to her death (see paras 27–31).

(5) Since the learned trial judge had fully considered the appellant's defence which was canvassed and advanced during the course of the trial and which defence was similar to the appellant's defence as stated in exh D71, the court was thus of the view that even though the learned trial judge made no reference to exh D71 in his grounds of judgment, the appellant's defence as contained in exh D71 was duly considered indirectly by the learned trial judge and the appellant was not prejudiced in any way or manner (see para 36).

(6) The appellant's conduct in bringing the deceased child to the clinic on the day of incident did not assist the appellant as it was self-serving and could not be taken to mean that the appellant did not cause injuries and subsequent death to the deceased child. The appellant could very well have fatally injured the deceased child and then brought the deceased child to the clinic for medical treatment, in an attempt to show that he was an innocent party (see para 37).

(7) Based on the above findings after having considered the findings and reasons given by the learned trial judge in convicting the appellant for the charge preferred, the court found that the learned trial judge did not made errors in material findings of facts which warranted appellate intervention. The learned trial judge had not erred in anyway in the findings and reasoning made in respect of the conviction. Therefore, there were no merits in the appellant's appeal and the conviction was safe (see para 42).

[Bahasa Malaysia summary

Perayu dituduh atas kesalahan membunuh kanak-kanak ('kanak-kanak yang mati') di bawah s 302 Kanun Keseksaan. Kes pendakwaan adalah berdasarkan keterangan berikut: (a) keterangan ibu kepada kanak-kanak yang mati tersebut ('SP21') bahawa dia telah melihat kecederaan pada badan dan muka kanak-kanak tersebut sejak perayu tinggal bersama mereka; (b) keterangan kakak kepada kanak-kanak tersebut yang merupakan seorang saksi

kanak-kanak, bahawa dia melihat tindakan perayu memukul, menumbuk dan menendang badan kanak-kanak tersebut serta mengikat tangan dan membaling kanak-kanak yang mati tersebut ke dinding; dan (c) keterangan pakar patologi ('SP11') bahawa kecederaan-kecederaan tersebut adalah konsisten dengan kecederaan yang disebabkan oleh trauma daya tumpul seperti pukulan kuat dalam bentuk tumbukan atau tendangan, dan bahawa kecederaan-kecederaan tersebut bukanlah berlaku secara tidak sengaja atau dilakukan sendiri. Mahkamah Tinggi mendapati kes prima facie telah dibuktikan dan memanggil perayu untuk membela diri. Dalam pembelaan, perayu menafikan mencederakan kanak-kanak yang mati tersebut dan menegaskan bahawa SP21 adalah orang yang telah memukul dan mencederakan kanak-kanak tersebut. Perayu telah bergantung kepada keterangan teman wanitanya ('SD2') dan kawan baiknya ('SD3') untuk menyokong keterangannya bahawa dia adalah polis bantuan di Kuala Terengganu. Pada akhir perbicaraan, mahkamah mensabitkan dan menjatuhkan hukuman mati kepada perayu selepas mendapati pembelaan perayu adalah penafian kosong dan pemikiran terkemudian. Tidak berpuas hati dengan keputusan tersebut, perayu telah memfailkan rayuan semasa berdasarkan dua alasan rayuan: (i) bahawa hakim bicara yang bijaksana telah terkhilaf apabila Yang Arif tidak mematuhi s 182A Kanun Tatacara Jenayah ('KTJ'); dan (ii) bahawa hakim bicara yang bijaksana telah terkhilaf apabila Yang Arif gagal menjalankan penilaian yang adil dan saksama terhadap kes pembelaan. Perayu berhujah bahawa dalam menilai pembelaan perayu, hakim bicara yang bijaksana telah gagal untuk mempertimbangkan pernyataan perayu di bawah s 112 KTJ ('eksh D71') dan kelakuan perayu dalam membawa kanak-kanak yang mati tersebut ke klinik.

Diputuskan, menolak rayuan dan mengesahkan perintah Mahkamah Tinggi:

(1) Adalah menjadi prinsip undang-undang bahawa apabila rayuan dikemukakan di hadapan Mahkamah Rayuan, rayuan tersebut berbentuk penerusan perbicaraan dan ia terbuka kepada Mahkamah Rayuan untuk memerintahkan atau menentukan sama ada pelbagai dapatan mahkamah perbicaraan adalah betul. Dalam menjalankan fungsi rayuannya, Mahkamah Rayuan diberi kuasa untuk menjalankan penilaian. Memandangkan rayuan adalah kesinambungan prosiding melalui perbicaraan semula, Mahkamah Rayuan boleh membuat pemeriksaan semula yang kritikal ke atas keterangan. Ia merupakan prinsip yang telah ditetapkan bahawa Mahkamah Rayuan harus tidak terburu-buru untuk mengganggu dapatan fakta oleh mahkamah rendah memandangkan Mahkamah Rayuan tidak mempunyai kelebihan untuk melihat dan mendengar saksi-saksi dan seterusnya menilai kredibiliti mereka (lihat perenggan 13–14 & 16).

(2) Pada akhir perbicaraan, s 182 KTJ mengenakan kewajipan ke atas mahkamah perbicaraan untuk mempertimbangkan semua keterangan

yang dikemukakan di hadapannya dan untuk memutuskan sama ada pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Pembelaan tertuduh mesti dipertimbangkan dalam keseluruhan keterangan yang dikemukakan oleh pihak pendakwaan (lihat perenggan 20).

(3) Berdasarkan alasan penghakiman hakim bicara yang bijaksana, Yang Arif telah menjalankan penilaian maksimum terhadap keterangan pembelaan perayu, SD2 dan SD3. Hakim bicara yang bijaksana juga telah menekankan percanggahan saksi-saksi pembelaan yang sepatutnya merupakan kenalan rapat jangka panjang perayu dan mendapati bahawa keterangan SD2 bahawa perayu telah berhenti bekerja sebagai polis bantuan dan keterangan SD3 bahawa perayu tidak mempunyai pekerjaan lain kecuali membantu bapanya menjual ikan bercanggah dengan keterangan perayu bahawa dia bekerja sebagai polis bantuan di Ibu Pejabat Polis Daerah Kuala Terengganu. Selanjutnya, hakim bicara yang bijaksana telah menilai sikap saksi-saksi pembelaan dan mendapati mereka tidak boleh dipercayai. Sudah menjadi undang-undang yang mantap bahawa Mahkamah Rayuan tidak akan terburu-buru dalam mengganggu dapatan fakta oleh hakim mahkamah perbicaraan yang dibuat berdasarkan kredibiliti saksi-saksi kerana hakim bicara mempunyai persepsi audio-visual terbaik terhadap saksi-saksi (lihat perenggan 21–24).

(4) Perayu gagal membuktikan pembelaannya semasa kes pendakwaan melalui saksi-saksinya. Perayu cuba mengalihkan kesalahan kepada SP21 tetapi ini tidak berjaya kerana tiada sedikit pun keterangan yang menyatakan bahawa SP21 adalah seorang ibu yang jahat, seorang yang panas baran atau kejadian di mana saksi-saksi melihat SP21 memukul atau menumbuk si mati. Selain itu, keterangan saksi-saksi pihak pendakwaan bahawa SP21 adalah seorang ibu yang penyayang dan tidak pernah memukul atau membelasah anaknya tidak dicabar oleh pihak pembelaan. Hakim bicara yang bijaksana adalah betul dalam berpendirian bahawa pembelaan perayu bahawa SP21 telah menolak dan menumbuk si mati sebelum SP21 pergi ke tempat kerja merupakan pemikiran terkemudian memandangkan versi ini tidak pernah dikemukakan kepada SP21. Sudah menjadi undang-undang yang mantap bahawa pihak pembelaan perlu mengemukakan pembelaannya semasa peringkat pendakwaan. Selanjutnya, hakim bicara yang bijaksana adalah betul dalam berpendapat bahawa pembelaan perayu adalah penafian semata-mata memandangkan tidak dipertikaikan bahawa hanya perayu, SP24 dan kanak-kanak yang mati tersebut sahaja yang berada di rumah pada masa kejadian, justeru, perayu adalah satu-satunya orang dewasa yang boleh menyebabkan kecederaan kepada kanak-kanak yang mati tersebut yang seterusnya membawa kepada kematiannya (lihat perenggan 27–31).

(5) Memandangkan hakim bicara yang bijaksana telah mempertimbangkan sepenuhnya pembelaan perayu yang telah dibentangkan dan dikemukakan semasa perbicaraan dan pembelaan tersebut adalah serupa dengan pembelaan perayu seperti yang dinyatakan dalam eksh D71, maka mahkamah berpandangan bahawa walaupun hakim bicara yang bijaksana tidak merujuk kepada eksh D71 dalam alasan penghakimannya, pembelaan perayu seperti yang terkandung dalam eksh D71 telah dipertimbangkan secara tidak langsung oleh hakim bicara yang bijaksana dan perayu tidak diprejudiskan dalam apa jua keadaan atau cara (lihat perenggan 36).

(6) Kelakuan perayu membawa si mati ke klinik pada hari kejadian tidak membantu perayu kerana ia adalah keterangan yang meyokong diri sendiri dan tidak boleh dianggap bahawa perayu tidak menyebabkan kecederaan dan seterusnya kematian si mati. Perayu boleh sahaja mencederakan kanak-kanak yang mati tersebut dan kemudian membawa si mati ke klinik untuk rawatan perubatan, dalam usaha untuk menunjukkan bahawa dia adalah pihak yang tidak bersalah (lihat perenggan 37).

(7) Berdasarkan dapatan-dapatan di atas setelah mempertimbangkan dapatan-dapatan dan alasan-alasan yang diberikan oleh hakim bicara yang bijaksana dalam mensabitkan perayu bagi pertuduhan yang dikenakan, mahkamah mendapati hakim bicara yang bijaksana tidak melakukan kesilapan dalam dapatan-dapatan fakta yang material sehingga memerlukan campur tangan rayuan. Hakim bicara yang bijaksana tidak terkhilaf dalam apa jua dapatan-dapatan dan alasan-alasan yang dibuat berkenaan dengan sabitan tersebut. Oleh itu, tiada merit dalam rayuan perayu dan sabitan adalah selamat (lihat perenggan 42).]

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Andy bin Bagindah v PP [2000] 3 MLJ 644; [2000] 3 CLJ 289, CA (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101, FC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209; [1969] 1 LNS 52, FC (refd)
Jamaludin bin Md Kassim v PP [2010] 3 MLJ 221; [2010] 5 CLJ 928, CA (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (refd)
Mohd Johi bin Said & Anor v PP [2005] 5 MLJ 409; [2005] 1 CLJ 389, CA (refd)
Mohd Yusri bin Mangsor & Anor v PP and another appeal [2014] 4 MLJ 875; [2014] 7 CLJ 897, CA (folld)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)

PP v Mohd Bandar Shah bin Nordin & Anor [2008] 4 MLJ 556; [2008] 4 CLJ 859, CA (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
PP v Ma' Arif [1969] 2 MLJ 65 (refd)
PP v Mohammad Jobi Ullah [2020] MLJU 1271, HC (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79; [1970] 1 LNS 121, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 92(1)
Criminal Procedure Code ss 112, 182A
Evidence Act 1950 s 133A
Evidence of Child Witness Act 2007 s 6
Penal Code s 302

Appeal from: *Pendakwaraya lwn Aizat Abdullah bin Othman* [2019] MLJU 2024 (High Court, Shah Alam)

Hisyam Teh Poh Teik (with Veerranesh B Kumaresan) (Hisyam Teh) for the appellant.
Baizura bt Kamal (with Aida Khairuleen bt Azli) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Lee Heng Cheong JCA:

INTRODUCTION

[1] The appellant was charged for the offence of murder under s 302 of the Penal Code (Act 574) at the High Court for the murder of Hannah Sufiyah bt Mohammad Adib (No Mykid 140804–10–2876) ('the deceased child') and was found guilty and sentenced to death. Hence this appeal.

[2] The charge against the appellant reads as follows:

> Bahawa kamu pada 31.03.2016 jam di antara 8.00 pagi hingga 2.00 petang, bertempat di No. B-09-4-5, Apartmen Teratai, Jalan Putra Perdana 10, Putra Perdana, 47100 Puchong, di dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan membunuh seorang kanak-kanak perempuan bernama Hannah Sufiyah binti Mohammad Adib (No Mykid: 140804-10-2876), oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

A THE PROSECUTION'S CASE

[3] The most significant witnesses for the prosecution are SP21 and SP24 who is the elder sister of the deceased child. SP21 was the mother of the deceased child whilst SP24 who was only eight years old at the time of giving B evidence, was the eye witness, who gave evidence under s 133A of the Evidence Act 1950 and s 6 of the Evidence of Child Witness Act 2007. SP24 testified that she saw the appellant punching the deceased child and had also seen the appellant throwing the deceased child around and other instances of abuse.

C **[4]** SP21 testified that the appellant had been staying with her since February 2015 and she had seen injuries on the body and face of the deceased child since then. She further testified that the injuries were caused by the appellant as she had seen the appellant biting the deceased child.

D **[5]** On 31 March 2016, she went to work and left both her children with the appellant. Whilst at work, she received a call from the appellant informing her that the deceased child fell and that the appellant had brought the deceased child to a medical clinic. SP21 subsequently met the appellant at SP9's medical E clinic. When the deceased child died, the appellant had repeatedly told SP21, not to conduct a post mortem on the cause of death of the deceased child.

[6] PW11 (Dr Salmah bt Arshad), the pathologist who conducted the post mortem, confirmed that the cause of death of the deceased child was due to F 'massive subdural haemorrhage with cerebral oedema' and 'intra-abdominal injury due to blunt force trauma' as per her post mortem report (exh P33). PW11 testified that the injuries were consistent with that due to blunt force trauma such as strong blows in the form of punches or kicks.

G **[7]** On 19 February 2019, at the end of the prosecution's case, the High Court ruled that a 'prima facie' case successfully proven against the appellant and ordered the appellant to enter his defence. The appellant elected to testify under oath and called two other witnesses namely SD3 and SD2 in his defence.

H **[8]** At the end of the defence's case, the learned High Court judge ('learned HCJ') ruled that the appellant had failed to raise a reasonable doubt in the prosecution's case and convicted the appellant who was given the mandatory death penalty.

I **[9]** Being aggrieved by the High Court's decision, the appellant filed the present appeal which was heard by us. After perusing the appeal records and hearing submissions of both parties, we came to an unanimous decision. We found no merits in the appellant's appeal and found that the conviction of the appellant is safe. As such, we affirmed the appellant's conviction and sentence.

Our reasons are set down below. Parties shall be referred to, in their respective before this court.

FINDINGS OF THE HIGH COURT

[10] In convicting the appellant, the learned HCJ found as follows:

(a) that the testimonies of SP13, SP11 and SP24 clearly showed that the appellant is the person who has hit and punched the deceased child which caused her death;

(b) that the appellant's attempt to shift the 'blame' to SP21, the deceased child's mother as the person who has beaten and injured the deceased child, was unsuccessful;

(c) that the appellant's defence is one of a denial where the appellant denied harming the deceased child;

(d) that in his defense, the appellant denied that he had used his hand to punch the deceased child's stomach and further denied that the injury seen on the body caused by him. He also denied that he caused the death of the deceased child by throwing her against the wall as well as punching the stomach of the deceased child;

(e) that SP21 and SP24 have no motive of deliberately creating a story to incriminate the appellant and that there is no evidence adduced to show that these two have a grudge against the appellant;

(f) that the actions of the appellant on 31 March 2016, between 8am until 2pm, by punching the stomach of the deceased child as well as throwing the deceased child against the wall and tying deceased child, clearly showed that the appellant had the intention to kill the deceased child;

(g) that the testimony of SP11 supported the testimony of SP24 when SP11 concluded that the injuries suffered by the deceased child were not 'accidental or self-inflicted';

(h) that the defence of the appellant is an 'afterthought';

(i) that the appellant is not a truthful and reliable witness especially when viewed in the light of the testimony of SP24 who saw the appellant's actions of beating, punching and kicking the body of the deceased child as well as tying the deceased child's hands and throwing the deceased child against the wall. The testimony of SP24 was credible even though she was just a child; and

(j) that the findings of SP11 clearly showed the presence of 'multiple blunt trauma injuries' on the face, body, legs and hands of the deceased child. The cause of death was 'subdural', 'haemorrhage' and 'intra-abdominal injury due to blunt force trauma'.

THE APPELLANT'S CONTENTIONS

[11] Before us, the appellant forwarded the following two grounds in his appeal:

(a) that the learned trial judge erred when His Lordship did not comply with s 182A of the Criminal Procedure Code. This is taken up as a point of law; and

(b) that the learned trial judge erred when His Lordship failed to undertake a fair and just assessment of the defence case.

THE RESPONDENT'S CONTENTIONS

[12] In response, the respondent contended as follows:

(a) that the learned HCJ had undertaken a maximum evaluation of the evidence and that SP21's evidence is intact;

(b) that the learned HCJ had also considered the three defence witnesses' testimonies however their testimonies were not helpful to the defence;

(c) that the appellant's defence was implausible and that of a mere denial and an afterthought;

(d) that even though SP24 was a child of tender age, being eight years old when she gave her unsworn evidence in court, the learned HCJ was satisfied with SP24's answers to all the questions posed by the learned HCJ;

(e) that the learned HCJ had properly and correctly directed himself, on the need for independent corroborative evidence to support the evidence of SP24 that is the evidence of PW21 and also the evidence of PW11 where the injuries were not accidental or self-inflicted and it was due to blunt trauma like punches or kicks;

(f) that it was never disputed that the appellant was in care and custody of the deceased child and SP24 on the fateful day of the incident as SP21 had gone to work on 31 March 2016. SP24 was the only eye witness who saw what the appellant had done to the deceased child;

(g) that even though the evidence of SP24 was unsworn as she was only 8 years old when she gave evidence, she was a credible witness as her evidence was consistent and her evidence was corroborated by SP21 and SP11;

(h) that the learned HCJ has cautioned himself that SP24 had given unsworn evidence and correctly admitted her evidence as credible and consistent;

(i) that the evidence was so clearly against the appellant that any reasonable tribunal armed with the facts in this case would have come to the same conclusion ie the clear guilt of the appellant; and

(j) that the learned HCJ had evaluated the defence case and came to the conclusion that the appellant had failed to raise a reasonable doubt in the prosecution's case. The prosecution had proven the charge against the appellant beyond reasonable doubt.

DUTY OF AN APPELLATE COURT

[13] It is a principle of law that when an appeal comes before an appellate court, the said appeal takes the form of a continuation of a trial and it is open to the appellate court to order or determine if the various findings of the trial court are correct (see *Public Prosecutor v Ma' Arif* [1969] 2 MLJ 65; *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800).

[14] In the course of carrying out its appellate functions, the Court of Appeal is empowered to conduct an evaluation exercise. Since an appeal is a continuation of proceeding by way of rehearing and an appellate court may subject the evidence to a critical re-examination. In *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579, the Federal Court held as follows:

> We hold the view that even if the trial judge had failed to mention of any evaluation of common intention in his written grounds of judgment, the Court of Appeal, which in law reheard the case when exercising its appellate function, was empowered and also duty bound to carry out an evaluation exercise to determine whether common intention did exist. Here the Court of Appeal equally failed to do that. *An appeal is continuation of proceedings by way of rehearing and an appeal court may subject the evidence to a critical re-examination* (*Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; *Mohamad bin Deraman v Public Prosecutor* [2011] 3 MLJ 289.

[15] Reference is also made to the case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800, wherein the Federal Court held as follows:

> [20] As regards the first main ground of appeal raised by the appellant, *I am of the view that the Court of Appeal has the power to revise or re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings. In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct (see Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122). (Emphasis added.)

[16] It is an established principle that an appellant court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility (see *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79; [1970] 1 LNS 121).

[17] Further guidance can be found in the Court of Appeal case of *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875; [2014] 7 CLJ 897, where Zawawi Salleh JCA (as he then was) held as follows:

> [4] ... We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:
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> (a) the judgment is based upon a wrong premise of fact or of law;
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> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
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> (c) the trial judge has completely overlooked the inherent probabilities of the case;
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> (d) that the course of events affirmed by the trial judge could not have occurred;
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> (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or
>
> (f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

OUR ANALYSIS AND DECISION

[18] Bearing the above guidance and principles in mind, we will proceed to consider the appeal.

[19] Section 182A of the CPC provides as follows:

> 182A Procedure at the conclusion of the trial

(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[20] At the conclusion of the trial, s 182A of the CPC imposes a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution.

[21] On the issue raised by the appellant that the learned HCJ did not comply with s 182A of the Criminal Procedure Code ('the CPC'), by not adequately considering the defence of the appellant, we are of the considered view that the learned HCJ had undertaken a maximum evaluation of the defence evidence in respect of SD1, SD2 and SD3 as shown in the following passages in his grounds of judgment:

See RR, Jilid 1 page 44–45

Jadi persoalannya, adakah keterangan Tertuduh dan saksinya telah berjaya menimbulkan keraguan yang munasabah terhadap kes Pendakwaan?

Di dalam sesuatu perbicaraan, adalah menjadi tugas mahkamah untuk melakukan penilaian kes secara keseluruhan. Keterangan dari saksi-saksi pendakwaan perlu diteliti dan dipertimbangkan bersama dengan keterangan saksi-saksi pembelaan, bagi dibuat penilaian sebelum suatu keputusan dicapai. Di dalam melaksanakan penelitian tersebut, keterangan terperinci setiap saksi perlu dilakukan. Meneliti serta menilai semula keterangan yang disampaikan oleh saksi-saksi pendakwaan, saya mendapati keterangan pembelaan gagal menimbulkan keraguan yang menasabah di dalam kes pendakwaan. Terdapat banyak percanggahan yang tidak munasabah untuk diterima.

[22] The learned HCJ had highlighted the discrepancies of the defence's witnesses whom are supposed to be long term close associates of SD1. Having perused the grounds of judgment of the learned HCJ, we are of the considered opinion that the learned HCJ had evaluated comprehensively the evidence of the appellant, SD2, SD3 at length and made his following findings as follows:

(a) that the appellant's girlfriend (SD2) testified that the appellant was a *Polis Bantuan* in Kuala Terengganu but has stopped working when he moved to Shah Alam and that the appellant would occasionally goes back to Kuala Terengganu to visit her (SD2) and the appellant's family; and

(b) that SD3 who was the appellant's best friend testified that as far as he knows the appellant has no other job besides helping his father to sell fish. This contradicted the appellant's testimony that he worked as a *Polis Bantuan* at IPD Kuala Terengganu.

[23] In addition, the learned HCJ also evaluated the defence witnesses' demeanour and, inter alia, held:

(a) at *RR Jld* 17 at pp 46–47:

> Tambahan daripada itu juga, SD3 juga menunjukkan saksi ini bukanlah saksi yang boleh dipercayai. SD3 ketika disoal balas oleh Pendakwaan menyatakan dengan jelas bahawa selepas bulan Disember 2015, SD3 tidak bertemu dengan tertuduh lebih kurang 7-8 bulan. SD3 juga setuju dengan cadangan pihak Pendakwaan bahawa selepas bulan Disember 2016, SD3 hanya berjumpa Tertuduh pada bulan 7 atau 8 tahun 2016. SD3 seterusnya menjelaskan tidak berjumpa Tertuduh sebab pada waktu itu SD3 ke laut dan tidak berhubung dengan Tertuduh dan tidak tahu keberadaan Tertuduh. Namun begitu, keterangan SD3 ini ketika ditanya oleh pihak pembelaan menyatakan ada menemui Tertuduh selepas bulan Disember, 2015 iaitu pada bulan Februari 2016.

(b) at *RR Jld* 17 at pp 48:

> ... Rujukan dibuat kepada satu tiket yang mana Tertuduh menyatakan pada tarikh 27.3.2016 Tertuduh telah pulang dari Terengganu ke Putrajaya dengan menaiki bas. Namun SD2 dengan yakin menyatakan pada tarikh 19.3.2016 sehingga 28.3.2016 Tertuduh masih berada bersamanya di Terengganu. Berlaku percanggahan di sini. Oleh kerana itu keraguan timbul kepada catitan yang dibuat oleh SD2 ini sama ada catitan tersebut benar ataupun hanya dibuat bagi mambantu Tertuduh.

(c) at *RR Jld* 17 at pp 49:

> ... Jadi oleh kerana itu, di dalam keadaan sebegini, di mana berlakunya kesilapan di dalam catitan tarikh-tarikh di mana Tertuduh berada dan juga di dalam keadaan catatan dibuat pada waktu SD2 ini 'stress' dan SD2 sendiri akui terdapat kesilapan pada catatannya itu, jelas bahawa catatan yang dibuat oleh SD2 ini bukanlah sesuatu yang dijadikan sebagai dibuat pergantungan. Lantas ia menunjukkan bahawa kredibiliti saksi ini tergugat kerana menyatakan apa yang bukan sebenarnya berlaku.

[24] It is trite that the appellate court will be slow in disturbing the finding of facts by the trial court judge based on credibility of witnesses as the trial judge has the best audio visual perception of the witnesses. The learned HCJ had correctly assessed the defence against the evidence of the prosecution. The finding of fact made by the trial HCJ that the defence failed to raise a reasonable doubt turned solely on the credibility of the appellant. His Lordship had heard the defence and was in a better position to determine whether the

defence raised by the appellant is credible or otherwise. A

[25] In *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1, the Federal Court at p 28 (MLJ); pp 36–37 (CLJ) held:

> [68] Furthermore the three judges of the Court of Appeal had unanimously confirmed the findings of facts of the learned Judicial Commissioner. In the light of the concurrent finding of facts by the courts below I am of the view that it is not proper to disturb his finding. B

[26] Further guidance can be found in *Public Prosecutor v Mohd Bandar Shah bin Nordin & Anor* [2008] 4 MLJ 556; [2008] 4 CLJ 859, where the court held, inter alia, at p 562 (MLJ); p 867 (CLJ) as follows: C

> ... In approaching issues of credibility it is always necessary to bear in mind the tests that a trier of fact should ordinarily apply when evaluating oral evidence. Once of the tests is motive. The presence or absence of motive on the part of a witness is a relevant consideration which a trial court should take into account. See *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110; [1974] 1 LNS 176. Another relevant consideration are probabilities of the case. If a witness' evidence is improbable, this would be good reason for rejecting his evidence or according it very little weight. By the same token, where the evidence of a witness accords with the probabilities of the case, it would be a serious misdirection on the part of the trial court to give it little or no weight on grounds of credibility. D E

[27] Further, we are of the considered view that the appellant failed to establish its defence during the case for the prosecution through its witnesses. The appellant sought to shift the blame to SP21 as the person who had inflicted the injuries on the deceased child which led to her death and we find that such an attempt to be without basis and unsucessful. This is because there was not any iota of evidence adduced throughout the trial that the prosecution witness namely, SP21 was a bad mother, a hot-tempered person or incidents where witnesses had seen PW21 hit or punched the deceased child. SP14, SP15, SP16 and SP17 all testified that SP21 was a loving mother towards her children and had never hit or beat her children. This piece of evidence was never challenged by the defence. This is what SP14, SP15, SP16 and SP17 respectively said: F G H

(a) *RR*, encl 19, *Jld* 2(2), p 171 paras 10–16. SP14 (Intan Syafikah bt Mohd Hamzah) (SP21's ex-colleague) said:

> S: Sepanjang kamu kenal dengan SP21, macam mana dia dengan anak-anak dia?
>
> J: Dia lembut je dengan anak-anak dia. Kalau anak cakap apa pun dia ikut je. Saya tidak pernah tengok dia marah anak dia. I

(b) *RR*, encl 19, *Jld* 2(2), p 181 paras 10–12, SP15 (Puan Syarifah bt Saad) (PW21's mother-in-law) said:

S: Macam mana Makcik tengok hubungan SP21 dengan anak-anak ni?

J: Dia sayang anak-anak dia.

(c) *RR*, encl 20, *Jld* 2(3), p 203 paras 3–10, SP16 (Mohd Yusof bin Abdullah) (PW21's father-in-law) said:

S: Ketika tinggal bersama-sama dengan SP21 dan anak-anak ni, macam mana Encik tengok hubungan antara SP21 dengan anak-anak?

J: Hubungan SP21 dengan anak-anak tidak ada masalah dan SP21 seorang yang penyayang, sentiasa cakap dengan lembut dengan anak-anak dia, tidak pernah pukul anak-anak dia. Kalau dia marah-marah tu biasalah tapi dia tidak pernah pukul anak-anak dia.

[28] The learned HCJ had also considered in his grounds of judgment that the appellant's version of events on the fateful day of 31 March 2016 that when the deceased child wanted to follow PW21 and grabbed her by the leg as she was leaving for work and crying at the same time. This made PW21 angry at the deceased child and PW21 pushed the deceased child to the floor and dragged her to the TV and punched her several time. The learned HCJ held that this was a made up story by the appellant. This version was never put to SP21, thus it is an afterthought.

[29] It is trite law that the defence has to establish its defence during the prosecution stage. In the case of *Public Prosecutor v Mohammad Jobi Ullah* [2020] MLJU 1271, Mohd Radzi bin Abdul Hamid, JC held:

[25] ... *The failure of one party to cross-examine the witness of the adverse party, by putting to him or her the version of his story must be taken to mean that version of the adverse party on that issue had been accepted as the truth* (see, *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138) and *AEG Carapiet v AY Derderian* [1961] AIR Cal 359]. Of course, the cause celebre of *Browne v Dunn* [1893] 6 R 67, saw Lord Halsbury in the English House of Lords, stating the following:

> *It seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a particular witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination.*

[26] This rule has since become the gold standard, inter alia, regarding how a cross-examination ought to be managed by trial counsel. *Putting one's case to the relevant adverse party's witnesses during their cross-examination is not merely a matter of technical procedure but more importantly, it is also one of substantial justice. It exists to ensure fairness to the witness and to the court in that it gives an opportunity to the party to put his case to a witness in the face of any contradiction, which he plans to make to his testimony. As such, where a party fails to cross-examine his evidence or on any particular part of it, like in the present appeal [on the failure of the Accused person to cross-examine PW1 on the alleged use of a parang by the deceased] such failure amounts to an implied acceptance of the evidence and that party is not allowed to challenge it later* (see for

example the case of *R v Wood Green Crown Court, ex P Taylor* [1995] Crim LR 879).

[30] The learned HCJ also had said that the appellant's defence was a bare denial. It was never disputed that only the three of them ie the appellant, SP24 and the deceased child was at home at the time of the incident. The appellant was the only adult that could have caused the injuries to the deceased child which led to her death on the day in question. Further, SP24's following testimonies are most pertinent and damaging:

(a) *RR*: encl 17, *Jld* 1, p 51:

> Namun, apabila penelitian dilakukan terhadap isi kandungan keterangan yang disampaikan oleh saksi mata, khususnya SP24 yang melihat sendiri akan segala perbuatan dan perilaku Tertuduh terhadap si mati, adiknya, pembelaan yang diutarakan oleh Tertuduh, setelah diteliti dan diimbangi, ia jelas merupakan penafian semata.

(b) *RR*: encl 23, *Jld* 2(6), p 527, para 15 — cross-examination:

> S: Summayyah, pakcik nak tanya, sebenarnya Ayah Ijat ini dia tak pernah pun pukul Cupiah, betul tak?
>
> J: Tak betul.

(c) *RR*: encl 23, *Jld* 2(6), p 528, paras 3–15:

> S: Pakcik tanya lagi, Ayah Ijat dia tak pernah pun tumbuk Cupiah?
>
> J: Tak betul
>
> S: Pakcik tanya lagi, Ayah Ijat dia tak pernah baling Cupiah?
>
> J: Tak betul
>
> S: Pakcik tanya lagi, Ayah Ijat ni dia tak pernah pun ikat Cupiah?
>
> J: Tak betul
>
> S: Jadi, bila SP24 kata tak betul ni, SP24 nampaklah semua yang Ayah Ijat buat?
>
> J: Nampak

[31] Based on the aforesaid reasons, we are of the considered view that the learned HCJ was correct in making such findings and there is no merit in this contention of the appellant.

[32] The appellant also contended that the learned HCJ did not consider all the evidence when assessing the defence of the appellant, in particular the following evidence namely:

(a) the s 112 of the Criminal Procedure Code statement of the appellant (exh D71); and

(b) the conduct of the appellant of bringing the deceased child to the clinic.

[33] On the issue raised by the appellant that the learned HCJ did not even considered exh D71 which is the appellant's s 112 of the CPC statement dated 3 April 2016, which was made soon after he was arrested by the police, we are of the considered view that the learned HCJ did consider the appellant's defence which was advanced during the course of the trial which is similar to the defence stated by the appellant in exh D71. This was reflected in the following paragraph of his grounds of judgment where he said:

> Pelbagai isu telah dibangkitkan oleh pihak pembelaan. Di antaranya ialah kecederaan yang dialami oleh si mati hingga membawa kepada kematiannya adalah disebabkan oleh ibu si mati sendiri (SP21). Untuk meneliti isu yang dibangkitkan ini, elok diteliti akan keterangan pihak-pihak yang rapat serta mengenali ibu si mati.

[34] It is noted that the learned HCJ then proceeded in his grounds of judgment, to consider the evidence and testimonies of the relevant witnesses as to why he rejected the defence of the appellant.

[35] It is pertinent to note that in exh D71, the appellant stated, inter alia, his defence as follows:

(a) during the second and third week when he was staying with SP21, he saw SP21 always hitting the deceased child, by kicking the stomach, hitting the back and using a clothes hanger. SP21 also always dragged the hands of the deceased child when she is angry or when the deceased child was crying loudly. Further the appellant stated that he has seen SP21;

(b) the appellant further stated that he was really surprised to see SP21 kicking the deceased child hard like an adult and slammed the deceased child to the floor. Whenever the appellant saw her doing it, he would stopped SP21. While the deceased child was being beaten, she was really crying loudly. Sometimes, I would persuade her and sometimes, I just let the deceased child cry alone;

(c) with regards to SP21's eldest child, SP21 also kicked and hit her eldest child but not as frequent as what she did to the deceased child. Usually her actions of hitting the children caused them to fall;

(d) on 30 March 2016, at about 9am, the appellant stated that SP21 beat the children. Further, on 31 March 2016, at about 8am, SP21 was getting ready to go to work and at that time, the deceased child was holding SP21's feet and crying as if she was going to follow SP21 to go to work. Then at the front door of the apartment, the appellant saw SP21 snapping the deceased child's hands, dragged her and slammed her on the pillow on the bed mattress. Then the appellant saw SP21 shaking the head of the deceased child several times. SP21 was still angry and furious

with the deceased child. After that, the appellant saw SP21, pressing the stomach of the deceased child, several times. Then SP21 got up;

(e) at about 11.30am, after washing clothes, the appellant went to the kitchen to start cooking. At that time, the appellant sent an SMS to SP21, to ask what she wants to eat and SP21 said that she wanted to eat eggs. The appellant went to the kitchen to prepare the eggs;

(f) whilst the appellant was in the kitchen, the eldest daughter told him that the deceased child had vomited. The appellant asked the eldest child to take a cloth to clean the vomit. She took a trouser and cover the vomit. The appellant then told the deceased child not to walk and wait for him to clean the vomit. As the appellant was walking back towards kitchen, he heard he heard someone falling down and saw that the deceased child was lying on the floor and she has stopped breathing. The deceased child informed him that she fell down because she had slipped through the vomit. The appellant then contacted SP21 and informed her that the deceased child has vomited and had difficulty in breathing;

(g) the appellant then wrapped the deceased child with a pink blanket sheet as the weather was hot and the deceased child only wearing pampers;

(h) the appellant went down the apartment block, carrying the deceased child and found that she was still breathing but was quiet. The appellant found two Indonesian men and approached them, to seek help, in sending the deceased child and him to the clinic because the appellant told them that the deceased child was short of breath because she fell down at home. The two indonesian men agreed to send him and the deceased child to the clinic;

(i) inside the car and on the way to the clinic, the appellant found that the deceased child was still breathing. At the clinic, the appellant contacted SP21 and informed her that he has reached the clinic. After a while, SP21 arrived at the clinic and the appellant went back to SP21's apartment, to look after the other children. The appellant then took the other children and returned to the clinic with them. When the appellant reached the clinic, the doctor was still treating the deceased child;

(j) at about 2pm, the doctor from Hospital Putrajaya informed SP21 that the deceased child has passed away. The appellant was surprised and sad and SP21 was crying. Then SP21 and the appellant entered the room at the clinic, to see the deceased child. At that time, the appellant saw bruise marks on the forehead and bite mark on the right cheek of the deceased child as there was only a piece of white cloth covering the body of the deceased child up to her chest;

(k) the police informed that the body of the deceased child would be sent for post mortem and for further investigation. The appellant informed that SP21 told him to tell the police, not to do any post mortem or investigation; and

(l) after that, at around 6pm, the appellant and SP21 went to IPD Sepang, to provide information about what happened.

[36] Since, the learned HCJ has fully considered the appellant's defence which canvassed and advanced during the course of the trial and which defence is similar to the appellant's defence as stated in exh D71, we are thus of the considered view that even though the learned HCJ made no reference to exh D71 in his grounds of judgment, the appellant's defence as contained in exh D71, was duly considered indirectly by the learned HCJ and the appellant is not prejudiced in any way or manner.

[37] As regards the appellant's conduct in bringing the deceased child to the clinic on the day of incident, we are of the considered view that such conduct on the appellant strictly does not assist the appellant as it is self serving and cannot be taken to mean that the appellant did not cause injuries and subsequent death to the deceased child. The appellant could very well have fatally injured the deceased child and then brought the deceased child to the clinic for medical treatment, in an attempt to show that he is an innocent party.

CONCLUSION

[38] In *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129, the Federal Court referred to the case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381 which relied on the proviso to s 92(1) of the Courts of Judicature Act 1964 ('the CJA 1964') and held that as a general rule, the appellate court will in normal course of events, quash a conviction where there has been a misdirection. Exceptionally, it said, a conviction will be upheld despite a misdirection where the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. In other words, the court would still uphold the conviction despite the misdirection where no miscarriage of justice has been detected.

[39] In another Federal Court case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800, Zulkefli Makinuddin FCJ (as he then was) spoke of the powers of the appellate court to review or re-evaluate all the evidence available when hearing an appeal. At pp 628–629 (MLJ); p 812 (CLJ) of the report His Lordship states:

POWER OF APPELLATE COURT TO REVIEW OR TO RE-EVALUATE ALL AVAILABLE EVIDENCE

> As regards the first main ground of appeal raised by the appellant, *I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings. In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct. (See Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122; [1971] 1 LNS 84). *In the present case even though the Court of Appeal took the view that the High Court judgment was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and how it had implicated the appellant. There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from the witnesses called by the prosecution as appearing in the appeal records. I am therefore of the view that the Court of Appeal did not err on this issue.* (Emphasis added.)

[40] It is also settled that this court will be slow to interfere with the findings of the learned trial judge as primary trier of facts (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 at p 211; [1969] 1 LNS 52, *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289, *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101, and *Jamaludin bin Md Kassim v Public Prosecutor* [2010] 3 MLJ 221; [2010] 5 CLJ 928). In order to reverse the decision of the learned HCJ on such matter we must not merely entertain doubt whether his decision was right, but be convinced that it was wrong.

[41] In *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389, the Court of Appeal held:

> Unlike civil appeals where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. See, *Mohammad Husain v Emperor* AIR [1945] Nag 441; *Zahari bin Yeop Baai v Public Prosecutor* [1980] 1 MLJ 160.

[42] In the light of our above findings after having considered the findings and reasons given by the learned HCJ in convicting the appellant for the charge preferred, we are of the considered opinion that the learned HCJ did not made errors in material findings of facts which warranted appellate intervention. We could not say that the learned HCJ had erred in anyway in the findings and reasoning made in respect of the conviction. We are of the respectful view that there are no merits in the appellant's appeal and that the conviction is safe. In

A the premises, we unanimously dismiss the appeal.

[43] The order of the High Court dated 29 June 2022 is affirmed.

Appeal dismissed; order of High Court affirmed.

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Reported by Dzulqarnain Ab Fatar

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